

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-09)

Approved for use through 07/31/2012. OMB 0651-0031
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 05-629
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on _____ Signature _____ Typed or printed name _____	Application Number 10544297	Filed 08/03/05
First Named Inventor Lyddon		
Art Unit 3671		Examiner R.W. Addie
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/95) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>32901</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____ </div> <div style="width: 50%;"> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">/A. Blair Hughes/</div> <div style="text-align: right; margin-bottom: 5px;">Signature</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">A. Blair Hughes</div> <div style="text-align: right; margin-bottom: 5px;">Typed or printed name</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">312-913-2123</div> <div style="text-align: right; margin-bottom: 5px;">Telephone number</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">March 3, 2010</div> <div style="text-align: right; margin-bottom: 5px;">Date</div> </div> </div> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>		
<input type="checkbox"/> *Total of _____ forms are submitted.		

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
(Case No. 05-629)

In the Application of:)	
)	
Christopher J. Lyddon et al)	Examiner: R. W. Addie
)	
Serial No. 10/544,297)	
)	Group Art Unit: 3671
Filed: August 3, 2005)	
)	Conf. No. 8152
Title: Vehicle Arresting Device)	

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

PRE-APPEAL REQUEST FOR REVIEW

I. BACKGROUND

Claims 1-17 and 22-31 are pending in the application. Claims 1, 13, 26 and 29 are independent claims. Claim 9 stands objected to. Claims 1-8, 10-17 and 22-31 are finally rejected for being obvious over Blevins (US 6,206,608) in view of Horton (US 6,409,420) (claims 1-2, 4-8, 11-17 and 22), or in further view of (1) Marphetia (US 6,312,189)(claim 3); (2) Cudmore (US 4,596,731)(claims 10 and 23-29); (3) Uotila (US 5,310,277) or Ben (US 3,222,285)(Claim 30); or (4) in view of Uotila (Claim 31).

II. TRAVERSE OF THE EXAMINER'S OBVIOUSNESS REJECTIONS

A. Independent Claims 1 And 13 Are Non-Obvious And Patentable

1. Independent claim 1 is non-obvious and patentable

The examiner rejected claims 1-2, 4-8, 11-17 and 22 for obviousness over Blevins (USP 6,206,608) in view of Horton (USP 6,409,420). This rejection is traversed below at least because the cited prior art does not disclose the claim 1 feature of a net including "loops of said net being oriented with a longer dimension in the fore and aft direction than in the transverse direction of the device when laid flat on the ground in the path of a vehicle to be arrested."

The examiner admits in the Final Rejection that Figures 1 and 2 of Blevins clearly show rectangular loops defined by chains 10 and 12 (not 11) with the longer dimension being parallel

to the bar 5. In other words, the examiner agrees, as Applicant has maintained, that Blevins net has the exact *opposite* of the orientation of the net defined in independent claim 1 with the loops oriented in Blevins with a longer dimension in the transverse direction than in the fore and aft direction of the device. Despite this missing teaching in Blevins, the examiner continues to maintain that Blevins discloses this claim 1 feature because, among other reasons, claim 1 does not limit how the net is laid across or along the path of the vehicle – implying that the claim would be met if the Blevins device was to be laid across instead of along a roadway.

The examiner's rebuttal position is illogical and does not overcome the Applicant's rebuttable of the examiner's obviousness position. First off, claim 1 expressly defines the leading portion as that where the one or more transverse rows of upwardly-directed spikes are attached. So within the meaning of claim 1, the transverse and fore and aft directions are set and the corresponding elements of the Blevins device – in relation to the claimed invention - are readily identifiable and do not include a net oriented as claimed.¹

Secondly, the orientation of the Blevins device propounded by the examiner still does not include all of the claim 1 features. If one turns the Blevins device 90° from its intended orientation - as the examiner maintains is possible - to the direction of approach of the target vehicle and pretend that the fore and aft direction is the direction down the page as viewed in Figure 1 of the reference, then the elongation of the loops is then in that direction as claimed. However, the leading edge (in the sense of the direction of approach to the vehicle) becomes the top or bottom edge of the device as viewed in that Figure. But that is not the edge along which the spikes 30 are located as claimed, so the alternative arrangement propounded by the examiner still would not disclose all of the features of claim 1.

In addition, to use the Blevins device in the orientation propounded by the examiner is contrary to the instructions in the reference and to the understanding of one skilled in the art about how the device is used as demonstrated by the following Blevins excerpts:

"The device is placed on the road so that the vehicle to be stopped first engages the front end having the spikes" (column 2, lines 4-5).

"It is so denoted the front edge because it is the edge that a vehicle first encounters... At the front edge of the device, a series of bases 20, each provided with a spike 30, is provided" (column 2, lines 37-41).

¹ See the "T" and "FA" labels respectively in the Appendix of Applicant's July 22, 2009 Office Action Reply.

“As can be seen, the tire is approaching the front end and therefore will engage the spikes” (column 3, lines 24-25).

The examiner’s rejection claim 1 for obviousness over Blevins must be withdrawn because it is based upon an illogical interpretation of the reference. Instead, one skilled in the art would understand that the Blevins device is not intended to be oriented sideways as the examiner maintains and that if used in such an illogical orientation simply would not work. That is because in the examiner’s orientation: (1) the spikes extend along a side edge of the device such that there is a good chance that an approaching vehicle would not encounter the spikes at all; (2) the spikes are angled toward the defined front edge and would point sideways to the direction of approach of the vehicle thereby reducing the likelihood of piercing a tire; and (3) the rigid bar 5 along what would be a side edge would keep the device from wrapping around tires.

Independent claim 1 is non-obvious and patentable because the cited prior art does not disclose or suggest a device including “loops of said net being oriented with a longer dimension in the fore and aft direction than in the transverse direction of the device when laid flat on the ground in the path of a vehicle to be arrested.” Claims 2-8, 10-12, 17, 23 and 31 are patentable at least by virtue of their dependence upon claim 1.

2. Independent Claim 13 Is Non-Obvious And Patentable

Independent claim 13 is non-obvious for the same reasons recited above with respect to claim 1. Also, neither Horton nor Blevins disclose the claim 13 method of constructing their respective devices in which a net is deformed and retainers attached to maintain it in the deformed condition. Independent claim 13 is, therefore, non-obvious and patentable for at least these reasons as are claims 14-16, 22 and 24-25 which depend upon claim 13.

C. Independent Claims 26 And 29 Are Non-Obvious And Patentable

The examiner rejected claims 10 and 23-29, inclusive of independent claims 26 and 29 under 35 USC 103(a) over Blevins in view of Horton and further in view of Cudmore. Claims 10 and 23-24 are non-obvious by virtue of their dependence upon independent claims 1 or 13. The patentability of independent claims 26 and 29 is explained below.

1. There is no prima face case of obviousness of claims 26 or 29

Independent claims 26 and 29 both are directed in part to a device that in use “the net [or substrate in claim 29] becomes wrapped around the front wheels of the vehicle, and the portion

of the net [or substrate] between those wheels of the vehicle is pulled tight under the vehicle, thereby preventing further rotation of those wheels”. This is not the *modus operandi* of either the Blevins or Horton et al devices. It is submitted that for this reason alone independent claims 26 and 29 and their related dependent claims 27-28 and 30 are non-obvious and patentable.

2. Cudmore is non-analogous art that may not be considered

Claims 10 and 23-29 are also nonobvious because Cudmore is non-analogous art. Prior art is not analogous and may not be considered if (1) the art is not from the same field of endeavor as the claimed invention; and (2) the prior art reference from another field of endeavor is not pertinent to the particular problem faced by the inventor. *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986). The test for non-analogous art is met by Cudmore.

a. Cudmore is not in the same field of endeavor

Cudmore et al meets the first requirement of the non-analogous prior art test – it is not from the same field of endeavor as the claimed invention – vehicle arresting devices. Indeed, Cudmore et al – which is directed to structures adapted to protect grass seeded areas - is not remotely related to the art of vehicle arresting devices.

b. Cudmore is not reasonably pertinent to the problems faced by the inventor

MPEP §2141.01(a) establishes when an examiner may rely upon non-analogous art. The MPEP section notes that “any need or problem known in the field of endeavor at the time of the invention and addressed by the patent [or application at issue] can provide a reason for combining the elements”. The same MPEP section states that a non-analogous reference may be reasonably pertinent “if it is one which, because of the matter with which it deals, logically would have commended itself to the examiner’s attention.” *Id.* Here Cudmore would not logically have commended itself to the examiner’s attention – without hindsight – because it discusses a device that bears no resemblance, structurally or functionally, to the claimed device.

Notably, the claims are directed to vehicle arresting devices, one element of which is a particularly oriented and designed net or substrate that includes tire piercing spikes. Cudmore discloses a plastic grid layable upon a lawn or ground to walk upon. The only apparent relationship between Cudmore and the claimed invention is that Cudmore uses conical members - that the examiner apparently analogizes to the claimed spikes - that pass through apertures in another plastic grid that is placed on a lawn. In Cudmore et al, the conical members are inserted

downwardly into soil to secure the grid against the ground. Clearly, one skilled in the art at the time of the invention who was seeking to solve problems associated with upwardly directed tire piercing spikes of vehicle arresting device nets would not have considered Cudmore's disclosure of a lawn mat that includes downwardly directed conical members.

The examiner responded to Applicant's non-analogous art position by justifying the combination because claim 29 only requires a flexible substrate and is not limited to a net. This position ignores the fact that Cudmore is concerned with the landscaping art while all claims on their face are directed to vehicle arresting devices and methods. Likewise the examiner's comment that "Whether the grid is used to form walking surface secured to the ground, or a vehicle capture net for deflating tires and immobilizing the front wheels, does not appear relevant to the placement of the spikes on the net". None of the examiner's rebuttal arguments provide a logical factual basis as to why Cudmore because of the matter with which it deals would logically have commended itself to the examiner's attention as MPEP §2141.01(a) requires.

3. The prior art combination would not result in the claimed invention

Finally, independent claims 26 and 29 are non-obvious and patentable because the prior art combination would not logically lead to the subject-matter of claims 26 or 29. This is because the conical members of Cudmore et al are used as connectors to connect two grass protecting grids together. There is no equivalent function required in the present invention or in Blevins or Horton et al. There is also no hint or suggestion in either reference to connect two separate nets together. In addition, there is no disclosure in Cudmore et al that the conical members penetrate the actual grid on which they are carried. So it would not be obvious, as alleged by the Examiner, that they provide a means "to quickly replace used or damaged tire spikes". For this reason as well, independent claims 26 and 29 are plainly non-obvious and patentable and so are claims 27-28 which depend on claim 26 and claim 30 which depends on claim 29.

Finally, claim 3 is patentable by virtue of its dependency upon independent claim 1. Claims 30-31 are patentable by virtue of their dependence upon independent claim 29.

Date: March 3, 2010

By: /A. Blair Hughes/
A. Blair Hughes
Reg. No. 32,901